and as there were no other bidders who offered a higher price, the property was sold to the Kedah State Development Corporation who paid the required deposit of $1,500,000 by a banker's cheque."

Serious allegations were made that "the Chairman of the Kedah State Development Corporation and his legal advisers stated that the Kedah State Government wanted to acquire the said property for the Corporation and that if anybody else successfully bid and purchased the property, the Government would then acquire it. The defendant states that because of this when the Chairman of the Corporation made his bid of $15,000,000 no one else wanted to bid against him as a result of what had been intimated to them. The defendant further states that if the State Government wanted the land, they should have compulsorily acquired it and not bid at the sale. According to the defendant, these factors made the conduct of the sale unfair and unjust."

These allegations were categorically denied by the Manager of the Corporation and by the auctioneer and an Inland Revenue Officer present at the auction. Suffice it to say that here again we can find no reason to disagree with the learned judge's conclusion when he says: —

"A certain Lim Kim Suan filed an affidavit in support of the defendant's allegations but his affidavit is vague. He does not even know the identity of the person who made the successful bid nor the identities of the other alleged purchasers interested in the sale. If he had been there as a person interested in the conduct of the sale he would easily have found out the identity of the persons making the alleged statements which prevented the others from bidding and the identity of the others who were so affected.

In considering the weight to be attached to the allegations in affidavits, it is to be noted that the defendant's averments are not from his own knowledge as he was not present at the sale as is evidenced by Lim Kim Suan's affidavit. But his evidence while not stating the sources of his information has far more and detailed allegations than Lim Kim Suan who according to Lim Kim Suan's affidavit attended the sale at the defendant's request and he himself reported the proceedings to the defendant.

By itself the fact the defendant has not complied with Order 58 rule 3 in respect of the contents of affidavits would render it of little value to the court but when considered in the light of the affidavits of the General Manager of Kedah State Development, the auctioneer and the officer of the Inland Revenue Department, the court must reject the allegations of the defendants which could have rendered the auction sale void as a result of being conducted unfairly and unjustly. The court accepts the facts as stated by the Manager of the Kedah State Development Corporation in his affidavit."

Appellant's counsel submitted at pages 42-43 of the record that application to set aside may be made on ground of material irregularity or fraud. There was no allegation of either and the proviso is specific that even in such a case it was for the appellant to show he had sustained substantial injury.

One objection as to the mode of payment was abandoned at the hearing (ground 7 at page 46).

We see no reason to disagree with the decision of the learned judge. We find no evidence of malpractice or non-compliance with established practice in the conduct of auction sales.

Accordingly we dismissed this appeal with costs.

Appeal dismissed.

Solicitors: *K. Chandra & Co.*

N.T.S. ARUMUGAM PILLAI v. DIRECTOR-GENERAL OF INLAND REVENUE

[F.C. (Suffian L.P., Ong Hock Sim and Wan Suleiman F.JJ.) March 15, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 127 of 1976]

Revenue Law — Income Tax — Back duty investigation — Additional assessments — Some additional assessments statute-barred unless there was fraud or wilful default — Procedure before Special Commissioners — Onus of proof — Whether taxpayer given opportunity to present his case — Whether rules of natural justice complied with — Income Tax Ordinance, 1947, ss. 69(1) and 76(3) — Income Tax Act, 1967, ss. 3, 9(3).

This was an appeal from the decision of Chang Min Tat J. reported at [1977] 1 M.L.J. 67. The appeal was based on two issues, (1) Whether the procedure followed by the Special Commissioners in arriving at their Deciding Order was correct, (2) Whether the appellant had opportunity to present his case, in other words, whether the rules of natural justice had been observed.

Held, dismissing the appeal: (1) the learned trial judge was correct in holding that the Special Commissioners were entitled to adopt the procedure they did;

(2) the learned trial judge was right in holding that it could not be said that the taxpayer had not been heard or had in any way been prevented from or hindered in meeting the case against him;

(3) there was no merit in the appeal or any ground upon which the court could come to a decision contrary to that of the Special Commissioners and the learned trial judge.

FEDERAL COURT.

A. Jayadeva for the appellant.

Abdul Rashid bin Abdul Manaf (*Jaafar Mohamed Saman* with him) for the respondent.

Ong Hock Sim F.J. (delivering the judgment of the Court): This appeal was preceded by a Motion for leave to adduce further evidence which we rejected particularly as we can find no ground for acceding thereto. It raised substantially the reasons for the appellant's dissatisfaction with the Deciding Order of the Special Commissioners and the judgment of the High Court upon the case stated thereafter. We note that the appellant was not without legal advice and the new evidence was not such as has been uncovered after the case. We then heard the appeal.

Before us, counsel for the appellant elected to base his appeal entirely on two issues, namely: —

(1) Whether the procedure followed by the Special Commissioners in arriving at their Deciding Order was correct?

(2) Whether the appellant had opportunity to present his case, in other words, whether the principles of natural justice had been observed?

With respect to learned counsel, who assiduously pursued the arguments put forward both before the Special Commissioners and the High Court judge on the case stated, we do not, as did the Special Commissioners and the High Court Judge, find any merit or substance in them. We were referred to various provisions of the Income Tax Act, 1967 (the 5th Schedule). Having regard to the large amount of tax assessed, we had some sympathy with the appellant, but we can find no ground for criticizing the rulings by both the Special Commissioners and the learned

judge upon the same objections taken before us. We think that the law is adequately set out in *Halsbury's* Laws of England (3rd Edition) Volume 20, paragraphs 1352 et seq (pp. 684-686).

We need only refer to that portion of the case stated on this point as to the onus of proof. This appears at pages 149-153 of the record. It reads: —

'On the question of the onus of proof where time-barred assessments have been raised on the grounds of fraud or wilful default, we were aware of the facts in the case of *Amis* v. *Colls* 39 T.C. 148 where the U.K. Inspector of Taxes had accepted that in the circumstances it was for him to satisfy the Commissioners that fraud or wilful default had been committed by or on behalf of the Appellant in relation to income tax for the statute-barred years in question. We were also aware of the following dictum of Cross J. in that case where he indicated the procedure that could be adopted and said:

'It is clear that the onus of establishing that a case falls within the meaning of that proviso (to section 47 of the U.K. Income Tax Act, 1952) lies on the Crown, and the Inspector representing the Crown on the appeal could have taken one of two courses. He could, if he had liked, have opened his whole case on all the years, calling all his evidence as though the onus was on him to support all the additional assessments. Alternatively, he could first call such evidence as he thought fit to establish fraud or wilful default which he was alleging in connection with the first five years, and could then ask the Commissioners to decide whether he had made out his case on that point. If they decided that point against him then those years could be struck out altogether and the matter would proceed on the other years....'

In this case Counsel for Revenue did not choose either of the two possible courses indicated in the above-quoted English case. We have stated in paragraph 2 above the stand taken by both Counsel and after hearing arguments and considering the matter and bearing in mind the words of Lord Widgery C.J. in *Reg.* v. *Special Commissioners (exparte Martin)* 48 T.C. 1, at page 7 where he said:

'It is very important that the procedure before the Commissioners should be kept flexible to deal with widely varying types of cases which come before them, and Cross J. in *Amis* v. *Colls* (1960) 39 T.C. 148 has given useful guidance as to various alternative ways in which the procedure can be adopted to suit a particular case',

we decided that paragraph 22 of Schedule 5 of the Income Tax Act, 1967, in the absence of any rules made under section 154(1)(d) of the said Act, empowered us to regulate the procedure of the hearing. We therefore ruled that as the substantive onus of proving that the assessments for the years of assessments 1960 to 1972 were either excessive or erroneous was on the Appellant, he should begin and lead evidence first. When Revenue adduced evidence in reply it should then in the circumstances also discharge its onus of proving fraud or wilful default in respect of the statute-barred years of assessment, i.e., for years of assessment 1953, 1957, 1958 and 1959 before the Appellant could be called upon to discharge the onus of proving that those statute-barred assessments were excessive or erroneous. However, when the Appellant began, he adduced evidence not only in respect of the years of assessment 1960 to 1972, but he also gave evidence in respect of the statute-barred assessments."

Before the High Court the learned judge heard arguments whether the Special Commissioners were correct with regard to the procedure. A detailed and considered ruling on that was given by the learned judge at pages 290-296 of the record ([1977] 1 M.L.J. 67 at p. 70) which we now reproduce: —

"4. *The law of procedure and evidence in hearing before the Special Commissioners*

The law is contained in Schedule 5 to the Income Tax Act 1967. The relevant paragraphs are:—

10. One of the Special Commissioners may order

(a) two or more appeals by the same person or

(b) ....

to be heard together.

19. The Special Commissioners shall have....

(f) Subject to section 142(5), power to admit or reject any evidence whether oral or documentary and whether admissible or inadmissible under the provisions of any written law for the time being in force relating to the admissibility of evidence.

22. Subject to this Act and any rules made under section 154(1)

(d) the Special Commissioners may regulate the procedure at the hearing of the appeal and their own procedure.

Now, section 142(5)(i) and section 154(1)(d) of the Act are not of relevance in this connection. The former preserves the effect of the provisions in the Evidence Act 1950 relating to witnesses, while sub-sub-section (ii) removes the cloak of privilege from a tax-payer's documents and communications. The latter provides that the Minister of Finance may make rules regulating the practice and procedure in appeals to the Special Commissioners and the Special Commissioners' own procedure.

So far as I can discover, no rules have been made and the matter stands to be considered in the light of the above.

On this, it is apparent that the Special Commissioners may largely regulate the procedure at the hearing before them, subject always to the important consideration that the Appellant must be given a full and adequate hearing or reasonable opportunity to be heard. The Special Commissioners were aware of their right to regulate procedure and also of the great advantage in not being hide-bound to a rigid code of procedure. They relied on *Reg.* v. *Special Commissioners (ex parte Martin)* 48 T.C. 1 where Lord Widgery at page 7 said: —

'It is very important that the procedure before the Commissioners should be kept as flexible to deal with widely varying types of cases which came before them.'

It is, with respect a most apt quotation.

5. *Ruling of the Special Commissioners on (i) onus.*"

Here the learned judge repeated what the Special Commissioners said at pages 149-153 of the record for coming to their ruling on the onus of proof but he went on to observe: —

"This ruling was given on the first day of the hearing on December 3, 1974 and the hearing before the Special Commissioners was conducted on the basis of it. On this ruling the Appellant began and it was expected that in accordance with this ruling he would open his appeal with attempting to discharge the onus that lay upon him to prove that the additional assessments for the years of assessment 1960-1972 (inclusive) were excessive or erroneous and that the question of fraud or wilful default in respect of the years of assessment that were statute-barred would be left for cross-examination by Revenue since it was not his duty to open on this issue. He would have the right to call evidence in rebuttal of Revenue's contention in this matter.

The Special Commissioners also ruled that Revenue was to prove fraud and wilful default beyond reasonable doubt but the burden on the Appellant to rebut the case against him was on a balance of probabilities.

I would at this stage refer to the ruling of the Special Commissioners that the onus of proving fraud or wilful default is on Revenue. Before them, Revenue contended that the onus lay not with it but on the Appellant. Revenue's contention was rejected. Before me, Counsel for Revenue again attempted to submit that the Special Commissioners were wrong on this. With the greatest of respect, the decision of the Special Commissioners was, in my view, so eminently correct that I made it quite clear that it would be a waste of time for Revenue to contend otherwise before me, and I also pointed out that, in any event, Revenue had not preferred any appeal from that ruling."

We heard no substantive arguments for rejecting the conclusions of the learned judge, respecting which we find no valid legal objections can be sustained.

The next objection was that the appellant had been denied an opportunity to reply to the assessments made particularly to the exhibits after R111 to R240. We have looked at and scrutinized the record. We have first to mention what happened before the Special Commissioners as appears in the case stated — which was settled by the revenue in consultation with, or with the approval of the appellant's solicitors. That reads: —

"During cross-examination of the Appellant, Counsel for Revenue did put to him certain documents, i.e. those documents produced by Revenue before exhibit Rule 111 was produced and marked. At the end of the cross-examination of the Appellant, Counsel for Revenue indicated that there were many other documents to be produced but as he did not wish to cross-examine the Appellant on those documents, he would not produce them yet until he called his witness. When Revenue's witness was called to give evidence in chief, Counsel for Revenue then sought to produce the remaining documents which were marked exhibits Rule 111 onwards. The Counsel for Appellant objected to the production and admission of those documents on the ground that they had not been put to the Appellant first during his cross-examination. It was at that stage on July 22, 1975 that we over-ruled Counsel for Appellant's objections and admitted all the documents produced by Revenue from exhibits Rule 111 onwards.

Counsel for Appellant contended that his client had been taken by surprise on all those documents which had not been shown to him during his cross-examination by Counsel for Revenue. He asked for our ruling on that day, i.e. July 22, 1975, as to whether he would be entitled as of right to lead evidence in rebuttal. Counsel for Revenue argued that there was no element of surprise as the documents tendered, apart from those prepared by Revenue, were documents taken from the Appellant himself. We considered the matter and ruled at that stage that the Appellant had, as a matter of law, the right to lead evidence in rebuttal but that the court would have to be satisfied that, before evidence was adduced on any fact, the Appellant had been taken by surprise on that fact. However, on July 31, 1975, after the close of the case for the Respondent and after the court's ruling *on the question of fraud or wilful default, Counsel for Appellant informed us that the Appellant had elected not to call any further evidence in reply to show that the statute-barred years of assessments were excessive or erroneous, nor to give any evidence in rebuttal on any fact in relation to assessments for the other years* ...." (Italics supplied).

Before the High Court the same objection to the assessments was heard, particularly with regard to Exhibits after R111 to R240 and denial of opportunity to rebut and explain those exhibits. The judge's note as to this appears at pages 296, 297 and 298 now set out: —

"5. (ii) *Admission of Documents by Revenue*

The Special Commissioners ruled on July 22, 1975, after hearing a substantial objection, that Revenue could introduce all the documents it sought to put in after Rule 111, through its witness. To that ruling, they attached a rider, that the Appellant had, as a matter of law, the right to lead evidence in rebuttal but before evidence was adduced on any fact, the court would have to be satisfied that the Appellant had been taken by surprise on that fact. The documents were in accordance with the ruling admitted. The last document was numbered Rule 240.

It was obvious that the Special Commissioners considered but over-ruled the objection because it found that almost all the documents from Rule 112 to Rule 240 were documents seized by Revenue from the Appellant. The Special Commissioners also considered that in the events that happened, the Appellant had been given adequate opportunities and he did exercise the right to take copies of and cross-examine on all those documents of his which had been seized by Revenue. In these circumstances, they made the ruling with the attached rider. In other words, the Special Commissioners left the issue open so that at the close of the case by Revenue the Appellant had two courses open to him (1) he could lead evidence as a matter of right in rebuttal of fraud or wilful default with which he was charged in respect of the statute-barred years; and (2) if he could satisfy the Special Commissioners that he had been taken by surprise in respect of any fact in the years of assessment that were not statute-barred, he would then be given the right to lead evidence in rebuttal.

6. *Election by the Appellant.*

But without attempting to take both these courses the Appellant through his Counsel informed the Special Commissioners that he elected not to call any further evidence in reply to show that the assessments for the statute-barred years were excessive and erroneous or to give any evidence in rebuttal on any fact in relation to the assessments for the other years. This was, as I see it, a deliberate choice on the part of the Appellant and if this was so, then he cannot now be heard to contend that he was never heard or to submit that he was denied any opportunity of being heard. I would also observe that if the statement is correct that, in so far as the statute-barred years were concerned, the Appellant elected not to contend that they were excessive or erroneous, it must mean as a necessary inference that he did not any longer contend that there was no fraud or no wilful default on his part so as to prevent Revenue from re-opening the assessments of those years."

What then is the function of this court on this present appeal? The questions of fact found by the Special Commissioners were upheld on case stated as not being erroneous in law. The learned judge agreed that upon the facts set out in the case stated, there was no error in law nor wrong inference drawn. We considered this appeal but find no merit or any ground upon which we can come to a decision contrary to that of the Special Commissioners and the learned judge. We do not think, having regard to the very detailed and considered decisions arrived at, both as to the law and the facts, that this case is one where we are justified in intervening on behalf of the appellant. We are of the view that in the limited scope for appeals of this nature there are no merits in this appeal which we accordingly dismiss with costs.

Deposit to respondent to account of taxed costs.

Appeal dismissed.

Solicitors: *K. Chandra & Co.*